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MEMORANDUM

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DATE: November 21, 2003

RE: The Power of the Massachusetts Department of Public Health to Require
Immunization as a Condition for Entry into Schools and to Require Quarantine of
Infectious or Susceptible Individuals During Times of Outbreak

BACKGROUND AND SUMMARY

This memorandum explains the legal underpinnings of the DPH power to require immunization and quarantine in the school setting. After more than a century of favorable case law, it is clear that the DPH has the duty to protect the health and safety of the public and that both immunization and quarantine in the school context are reasonable means by which to achieve that goal. The existing DPH regulations respect families' religious beliefs relating to immunization, while at the same time acknowledge that the rights of all individuals, including those with sincere religious beliefs, must at times defer to society's interest in protecting the public against the spread of disease.

DISCUSSION

The authority of the Massachusetts Department of Public Health (the “DPH”) to require school immunization and home quarantine arises from the “police power” all states possess to regulate private individuals and interests for the good of the public health. This power has been defined as:

The inherent authority of the state (and, through delegation, local government) to enact laws...to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests, [i.e.] personal interests in autonomy, privacy, association, and liberty.¹

The Massachusetts legislature has granted the DPH and local boards of health wide discretion to determine what they consider injurious or unhealthful and the manner in which to address these issues, so long as any actions or regulations are consistent with state and federal constitutional principles. MGL c. 111, §§ 5 and 6. Police powers in the context of public health include all laws and regulations directly or indirectly intended to improve morbidity and mortality in the population, including immunization and quarantine statutes.²

The United States legal system has long recognized that the protection of the public health is one of the most important goals of government. In Jacobsen v. Massachusetts, the U.S. Supreme Court first identified mandatory vaccination of the general public as within the police power of the state. 197 U.S. 11 (1905). The plaintiff brought equal protection and due process claims in asserting that a citywide smallpox vaccination requirement violated his liberty interests of bodily integrity and decisional privacy. *Id.* at 25. The Court found that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members” consistent with the state’s traditional police powers. *Id.* at 27. Further, individual liberty “does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.” *Id.* at 26.

While the Court in Jacobsen refused to fully delineate the authority encompassed by the police power, it did mandate some judicial considerations of the constitutional limits of state public health regulation. First, the law must be premised upon a true public health necessity in order to prevent the state from acting, or mandating public action, “in an arbitrary, unreasonable manner.” *Id.* at 28. Second, the methods adopted to achieve the public health goal must have a “real or substantial relation” to protection of the public health, and cannot be “a plain, palpable invasion of rights.” *Id.* at 31. Third, a court may intervene if a regulation is so oppressive that the intervention is gratuitously onerous or unfair. *Id.* at 38-39. Finally, the measure itself should not pose a health risk to the subject, because such knowing harm would be “cruel and inhumane.” *Id.* at 39-40.

¹ Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint*, 48 (California/Milbank Series, 2000).

² Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 *Health Matrix* 265, 284-285 (2001).

This legal standard is highly deferential, indicating that the Court will support any reasonable state regulatory measure that is not wholly irrational, indiscriminate or enacted in bad faith.³ While the Supreme Court acknowledged its duty to “give effect to the Constitution,” it resolved that it was not the function of a court to determine which of many strategies would be the most effective for the protection of the public health against disease. *Id.* at 36. Rather, it was for the legislature to determine “in the light of all the information it had or could obtain,” having balanced the public and private interests, which method would most properly guard the public health and safety. *Id.* As stated above, the Massachusetts legislature has delegated this power to the Department of Public Health.

A. The Massachusetts Legislature and DPH have the Power to Require Varicella Immunization as a Condition for Entry into Massachusetts Schools

The DPH has determined that the prevention of the spread of varicella is a public health necessity in light of the debilitating effects the disease can have on certain children and immunosuppressed individuals and the contagious nature of the disease in school settings. This finding is consistent with recommendations from the Federal Centers for Disease Control.⁴ Second, the DPH has determined that the vaccination itself is highly effective, with relatively few side effects, to make mandatory immunization substantially related to the goal of preventing the spread of varicella. Further, the exemption for individuals with a reliable history of varicella protects against unnecessary vaccination. Finally, the statute allows exemptions to immunization if the child can provide a doctor’s note indicating the presence of a medical contraindication, thereby avoiding potential harm to the child. 105 CMR 220.500. Therefore, the underlying justification of the DPH regulations, though yet to be legally challenged relating specifically to varicella, will likely hold up to the Jacobsen test as an appropriate exercise of the police power.

At the state level, Massachusetts created the first school vaccination law in 1827.⁵ See MGL ch. 76, §15. Now, every state across the country requires school immunization as a reasonable means to protect the health of the public from the spread of disease,⁶ and courts at state and federal levels have consistently upheld the validity of compulsory school vaccination laws.

The U.S. Supreme Court has long recognized that a state may require public and private school children to be immunized as a condition of school entrance. In an early case, the Supreme Court rejected the notion that school vaccination laws are discriminatory because they mandate vaccination among children, but not others. Adams v. Milwaukee, 228 U.S. 572 (1913). The Court found that lawmakers have the discretion to apply vaccination and immunization laws against selected groups, like school children, without violating the equal protection clause so long as protected classes, such as gender and religious affiliation, are not implicated. *Id.*

³ See *Id.*

⁴ “Prevention of Varicella: Recommendations of the Advisory Committee on Immunization Practices,” *MMWR*, 45(RR11);1-25, July 12, 1996.

⁵ John Duffy, School Vaccination: The Precursor to School Medical Inspection, 33 *J. Hist. Med.* 344, 345 (1977).

⁶ As of 2002, all states in the nation require a set of immunizations for entry into public schools including measles, rubella, diphtheria and tetanus. The vast majority, with limited exceptions, also requires pertussis, mumps and polio. Thirty states, including Massachusetts, require the varicella vaccination.

In Spofford v. Carleton, the Massachusetts SJC evaluated the reasonableness of a school regulation implementing a precursor Massachusetts statute that required immunization before admission to school unless the child could present a doctor's note indicating he or she was medically unfit for vaccination. 238 Mass. 528, 530, 131 N.E. 314 (1921). Recognizing the "common knowledge" notion that "a public school composed of pupils from all sections of the city may become at any moment a source of danger to the public health unless the laws relating to vaccination are strictly enforced," the Court found that regulations could make school attendance contingent upon receipt of preventative immunization. *Id.* at 532. Therefore, the requirement of either immunization or a doctor's note indicating contraindication was not unreasonable, arbitrary or discriminatory. *Id.* This decision indicates that action taken in the school context to prevent an epidemic that does not currently exist is equally as reasonable as immunization to prevent the spread of an existing epidemic in the community as a whole.

The U.S. Supreme Court shortly thereafter adopted the rationale of the Spofford decision. In Zucht v. King, the Court found that a city ordinance making a certificate of vaccination a pre-condition for school attendance did not violate the 14th amendment due process or equal protection rights of a child excluded from school for failing to comply with immunization. 260 U.S. 174, 176-77 (1922). The Court based its reasoning upon many well-settled principles, including the Jacobsen decision, *supra*, indicating that compulsory vaccination is within the police power. The Court also noted that municipalities may vest broad discretion to local officials in matters relating to the creation and enforcement of health laws. (citations omitted, see *infra*). Finally, citing Adams, *supra*, the Court found that reasonable classifications, i.e. immunization requirements for all students to the exclusion of other children and adults, did not violate the equal protection clause merely because they are not all embracing. Based on this precedent, such ordinances "confer not arbitrary power, but only that broad discretion required for the protection of the public health." *Id.* at 176-177.

B. Immunization Requirements are not an Unconstitutional Burden on Religious Freedom

The First Amendment of the United States Constitution states "Congress shall make no law [1] respecting an establishment of a religion *or* [2] prohibiting the free exercise thereof..." (emphasis added). The first clause, the Establishment Clause, forbids governments from passing laws that favor any particular religious preference, and the second clause, the Free Exercise Clause, permits individuals to practice their religion freely without interference from government entities.⁷ Parents who oppose immunization regulations have argued that requiring an individual to submit to immunization that is inconsistent with his or her religious practices is counter to the Free Exercise Clause.

Nonetheless, requesting a child to submit to immunization, even if counter to the child's or parents' religious beliefs, is "generally viewed as constitutional."⁸ Long before statutorily established religious exemptions to school immunization requirements existed, the

⁷ See Erwin Chemerinsky, *Constitutional Law*, 967-68 (1997).

⁸ Lawrence Gostin, et. al., *School Vaccination Requirements: Historical, Social and Legal Perspectives*, 90 Ky. L.J. 831, notes 196, 198, 199 (2001/2002) (noting state supreme court decisions from Mississippi, Arkansas, and New York upholding mandatory immunization notwithstanding religious objection).

Massachusetts SJC and the Supreme Court recognized that religious beliefs must sometimes defer to regulations that protect the general health of the public.

Analyzing a precursor immunization statute that did not yet contain a religious exemption for school immunization, the Massachusetts SJC found that a defendant father was properly convicted and penalized for failing to send his child to school due to his refusal to vaccinate his children (a condition for attendance), notwithstanding his religious beliefs concerning vaccination. Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101 (1929). The court found that the defendant's religious views did not entitle him to an exception to the otherwise valid statute, citing Jacobsen and Spofford, *supra*.

In the case of Prince v. Massachusetts, the Supreme Court created the prevailing precedent that parents' religious freedom must give way to the state's interest in protecting the health of the public and individual children. In Prince, the defendant mother argued that a child labor law restricting her ability to allow her child to sell religious materials on the street was a violation of her 1st amendment right to free exercise. 321 U.S. 158, 64 S. Ct. 438 (1944). The Court noted that had only secular interests been involved, the regulation designed to protect the health and welfare of children would have been concededly valid. *Id.* at 165. Although the Court acknowledged the competing interests at stake, it found that "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death" through violation of either compulsory vaccination laws or child labor laws such as these. 321 U.S. 158, 166-67 (1944). While recognizing a respect for the private realm of family life, "neither rights of religion nor rights of parenthood are beyond limitation." *Id.* 166-167. Therefore, legal precedent arguably indicates that the right to free exercise of religion can be at times subordinated to society's interest in protecting the public against the spread of disease via mandatory school immunization.

The Massachusetts school immunization statute, however, along with almost every like statute in the nation, does contain a religious exemption from the immunization requirement out of respect for the religious practices of families in the Commonwealth. While not constitutionally obligated to do so, the existing statute, allowing an exemption for "sincere religious beliefs," respects individuals' free exercise of religion without unconstitutionally favoring particular religious preferences. This clause has been upheld against first amendment and equal protection claims in other jurisdictions. See e.g. Farina v. Board of Educ. of City of New York, 116 F. Supp. 2d 503, 148 Ed. Law Rep. 168 (S.D.N.Y. 2000) (stating that a religious exemption to the school immunization requirement for those whose opposition stems from "genuine and sincere religious beliefs" is valid); Turner v. Liverpool Cent. School, 186 F. Supp. 2d 187, 162 Ed. Law Rep. 256 (N.D. N.Y. 2002) (religious exemption did not violate the establishment clause because it promoted no particular religious point of view, did not primarily have the effect of advancing or inhibiting religion, and did not require the state to assess validity of students' religious beliefs in a manner that would cause excessive entanglement of church and state).

C. The DPH has the Power to Exclude Any Individual from School for A Period of Quarantine, Regardless of Religious Exemption from Immunization, in Order to Protect the Public from the Spread of Disease

Massachusetts law, as outlined below, authorizes the DPH and local boards of health to initiate isolation and quarantine upon the report of a case or a suspected case of specified reportable diseases, including varicella. Such quarantine applies to all individuals, regardless of religious affiliation, who are not immunized (as defined in DPH regulations) and susceptible. Because of the general applicability of the isolation and quarantine statute, Courts have found that it violates neither the Establishment Clause nor the Free Exercise Clause of the Constitution. All state and federal precedent, then, points to the fact that the Massachusetts isolation and quarantine regulations are a reasonable and legal means to prevent the spread of disease and, therefore, protect the health and welfare of the public.

1. Municipalities have the authority to enforce school immunization requirements in accordance with law, including the refusal to admit students who fail to meet immunization requirements.

The U.S. Supreme Court and the Massachusetts SJC have ruled that it is within the discretion of a local board of health to prevent a child from enrolling in school if he or she is neither vaccinated nor qualified for an exemption. Zucht, Spofford, *supra*. The highest courts of several states across the nation have also ruled that such action is well within the authority of local public health officials.

The Supreme Court of Mississippi, for example, has stated that “the protection of the great body of school children...against the horrors of crippling and death resulting from poliomyelitis or smallpox or from one of the other diseases against which means of immunization are known and have long been practiced successfully, demand that children who have not been immunized should be excluded from the school community until immunization has been accomplished.” Brown v. Stone, 378 So. 2d 218, 223 (1979). The highest court of Minnesota has stated that “the welfare of the many is superior to that of the few” and since “the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools.” State v. Zimmerman, 90 N.W. 783 (Minn. 1902). Similarly, the Supreme Court of North Carolina has noted, regarding an unvaccinated plaintiff, there “is no reason that the children of the public school should be exposed to like risk of infection, through her, or others in like case. Though the school children are vaccinated, there are always some whose vaccination is imperfect, and danger to them should not be increased by admitting those not vaccinated at all.” Hutchins v. Durham, 137 N.C. 68, 71 (1904). Finally, the Supreme Court of Texas noted that its ruling allowing the exclusion of unvaccinated children from school “[was] simply to deny these minors the privileges of the schools until they comply with the ordinance passed for their own protection and for the protection of their families, along with all others residing in the community.” New Braunfels v. Waldschmidt, 207 S.W. 303, 311 (Tex. 1918).

Although Massachusetts statutes and regulations do not dictate procedures for enforcing exclusion from schools, it is a long-established legal precedent that courts must exercise great caution in overruling the decisions of local authorities on questions involving the local health of a community. See Laurel Hill Cemetery v. San Francisco, 216 US 358 (1910); Zucht v. King, *supra*. From this tradition, it follows that municipalities have broad discretion relating to the enforcement mechanisms they chose in upholding school immunization requirements.

In general, however, the majority of children are vaccinated. Those who are not immunized fall into one of three exempted categories including medical contraindication, interference with sincere religious beliefs, or medical documentation of immunity. MGL c. 76, §15; 105 CMR 220.500. Although precedent indicates that the legislature, through the DPH, could refuse all unvaccinated children from public schools, the state has made a policy decision to allow admission of certain individuals into the schools without immunization. But, admission of such students is subject to adherence to mandatory isolation and quarantine requirements of the DPH and local boards of health.

2. The state has the power to quarantine and isolate students under certain conditions.

a) General Authority

The ability of the state to isolate and quarantine individuals is a long-established power. Although courts recognize that such detainment may impose upon the liberty interests of individuals, “[t]he notion that the liberty of the individual must sometimes be restricted for the good of the community is one that cannot be seriously questioned.”⁹ The above discussion regarding the state’s ability to require general immunization, Jacobsen, combined with the state power to require immunization as a pre-requisite for school attendance, Zucht, combined with the great discretion granted to the DPH to isolate and quarantine to promote the general welfare of the people, indicates that isolation and quarantine within the school context is reasonable and permissible.

Although isolation and quarantine statutes have recently come under increasing constitutional scrutiny when they deprive a person of their liberty or bodily integrity,¹⁰ it does not appear that the school isolation and quarantine requirements concerning varicella would give rise to any constitutional violations of due process. Whether or not an education is a liberty interest that deserves higher standards of judicial review is doubtful in light of Spofford and Zucht, *supra*. In any event, the DPH, in adopting regulations requiring varicella immunization and establishing isolation and quarantine requirements, has indicated its position that varicella is a truly dangerous disease. As such, the state has a compelling interest to control its transmission. Finally, isolation or quarantine of susceptible individuals is a well targeted intervention that is not barred on religious or other potentially discriminatory grounds, and exclusion from school – with no other limitations on the liberty of the child – is the least restrictive means to prevent the spread of disease through the school system and greater community.¹¹ Therefore, mandatory isolation and quarantine of susceptible individuals during times when varicella is present is likely to be found constitutional.

⁹ Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 Hofstra L. Rev. 53 (1985).

¹⁰ See fn. 2, 11 Health Matrix 265, 305-306.

¹¹ See *id.* Gostin argues that isolation or quarantine that deprives persons of their liberty will only pass constitutional muster if the state can substantiate its actions to a higher degree than that required for general police powers. Therefore, the actions of the state must not only be reasonable, but the need for the action must be compelling and there must be a tight nexus between the need and the action taken, here exclusion from school.

b) Exclusion From School

In an early case, the Massachusetts SJC upheld the power of the school board, pursuant to its own regulations, to suspend children from school who refused to be vaccinated during a smallpox outbreak in the area. Hammond v. Hyde Park, 195 Mass. 29, 30 (1907). The court found that the reasonable regulation of the school board to temporarily exclude unvaccinated students was in the best interest of the pupils and all of the people of the town. *Id.* In so ruling, the Court expressly overturned the opinion of the lower court judge that once a student had been admitted under a statutory exemption for medical contraindication, the school committee lacked the authority to subsequently exclude the child, even during an outbreak of disease. *Id.* at 31-32.

The local boards of health and the DPH similarly have the independent power to exclude current students, otherwise allowed to enroll under a statutory exemption to immunization, from school for short periods of time. See MGL c. 111, §6 (stating that the DPH, having co-ordinate powers with local boards of health, “shall make such rules and regulations consistent with law for the control and prevention of such diseases [it deems to be dangerous to the public health] as it deems advisable for the protection of the public health.”).

Pursuant to this authority, the DPH has developed regulations governing immunization requirements for admission to schools and the allowable exemptions. See 105 CMR 220.000. Additionally, pursuant to the same authority, the DPH has developed regulations relating to the reporting requirements of diseases it deems dangerous to the public health and the ensuing isolation and quarantine requirements. See 105 CMR 300.000. The DPH has long interpreted these provisions as operating independently. That is, admission of unimmunized students to school under an exemption would not preclude a school, local board of health, or the DPH from excluding those same students in the event of a possible outbreak of disease.

In the school context, varicella is one of many diseases that “shall” be reported to the local board of health upon the discovery of a case or suspected case. 105 CMR 300.110. In turn, the local board of health and the DPH are authorized to implement and enforce the requirements for isolation and quarantine pursuant to 105 CMR 300.200. In accordance with the regulations, individuals who have chicken pox are subject to isolation requirements and must stay home from school until the lesions have dried and crusted or until no new lesions appear. *Id.* Those susceptible individuals who have not undergone immunization due to their enrollment pursuant to a regulatory exemption are subject to quarantine requirements and, upon direction by a proper authority, must be excluded from school during the 10th and 21st days after their last exposure. *Id.*